

**MINUTES
SEPTEMBER 30, 2005**

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:08 a.m., on Friday, September 30, 2005, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Robin Shropshire, Don Marble, Bill Rossbach and Kim Lacey (via Telephone)

Board Members Absent: Gayle Skunkcap

Board Attorney Present: Katherine Orr, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Richard Oppen, Director; Tom Ellerhoff, Acting Board Liaison; John North, Chief Legal Counsel; Lisa Peterson, Director's Office; Claudia Massman, Legal; Norman Mullen, Legal; Jane Amdahl, Legal; David Rusoff, Legal; Jim Madden, Legal; Ed Hayes, Legal; Steve Welch, Permitting & Compliance Division (PCD); Don Vidrine, Air Resources Management Bureau (ARMB), PCD; David Klemp, ARMB, PCD; Debbie Skibicki, ARMB, PCD; Charles Homer, ARMB, PCD; Jan Brown, ARMB, PCD; Julie Merkel, ARMB, PCD; Dan Walsh, ARMB, PCD; Sara Williamson, ARMB, PCD; Rachel Clark, Public Water Supply & Subdivisions Bureau (PWS), PCD; Jon Dilliard, PWS, PCD; Kari Smith, Water Protection Bureau, PCD; Ed Thamke, Waste & Underground Tanks Management Bureau, PCD; John Arrigo, Enforcement Division (ENF); Frank Gessaman, ENF; Art Compton, Planning, Prevention & Assistance Division (PPAD); Bob Bukantis, Water Quality Planning Bureau (WQPB), PPAD; Christian Levine, WQPB, PPAD; Louise Moore, Air, Energy & Pollution Prevention Bureau, PPAD; Sandi Olsen, Remediation Division (REM); David Bowers, Hazardous Waste Site Cleanup Bureau, REM.

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Margaret Eggers; Jessica Eggers; Mike Stanley, Fergus Electric; Joe Dickson, SME; W. Eggers; Gail Abercrombie, Montana Petroleum Association; Joe Walks Along, Jr., Northern Cheyenne Tribe; Tracy "Ching" King, Fort Belknap Indian Community; Willie Duffield, Counties; Richard Dunbar, Phillips County; Candace Payne, SME; Patricia Ramos, Northern Cheyenne Environmental Protection Department; Anne Hedges, Montana

Environmental Information Center (MEIC); Julie DalSoglio, Environmental Protection Agency (EPA); Rich Southwick, GNPd; Toney Helzer, SME; Dave Kelsey, SME; Donald Quander, Montana LCG; Clayton McCracker, Sierra Club; Scott Summers, Energy Labs, Inc.; Bud Clinch, Montana Coal Council; Alan Olson, House District 45; Elrena Whitedin, Northern Cheyenne Tribe; Christine Phillips, Sierra Club; John Wilson, Montana Trout Unlimited; Randy Siemers, Progressive Labor Caucus; Tom Schneider; Alexandra Gorman, Women's Voices for the Earth; Patrick Judge, MEIC; Gary Forrester, Montana Dakota U; Myshell LydoyUhl, NWF; Florence Anderson; Lora Wier, Montana Public Health Association; James Parker, PPL Montana; Janet Ellis, Montana Audubon; Nathan Birkewind, Montana Wildlife; Jerome Anderson, PPL Montana; Bonnie Turner, Westmoreland; Matt Leow, Montana PIRG; Tim Gregori, SME; Jim Keans, House District 75; Dr. Victoria Homer; Stuart Lewin, Missouri River Citizens; Hilary Rausdell Lewin; Bill Connors, Centennial Power; Lyle Hamilton, MAC; Mark Lambrecht, PPL Montana; Dan Flynn, IBEW; Keith Allen, IBEW; Don Allen, Western Environmental Trade Association (WETA); Doug Hardy, Montana ---- Coops; Haley Beaudry, WETA; Steve Wade, BKBH; Tom Ebzery, Puget PGE Pacificorp; Alan Sec, TRECO; David Hoffman, PPL Montana; J.D. Lynch, Montana State Building ----; Olaf Stimac, Jr., VA #41; Kendall Van Dyk, Northern Plains Resource Council (NPRC); Paul Seby, CEED; Michael Witsoe, Concerned Citizens of Great Falls, Cascade County; Cheryl Reinhert, M.D., Ph.D.; Charles Bocock, B.S.; Dr. Gail Charnley.

- I.A. Review and approve minutes of July 29, 2005, meeting.
- Mr. Rossbach MOVED that the Board approve the minutes of the July 29, 2005 meeting. Mr. Marble SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- II.A.1.a In the matter of CR Kendall Corporation's request for a hearing to appeal DEQ's decision to deny a minor permit amendment under the Metal Mine Reclamation Act, BER 2002-09.
- Ms. Orr had no further information to provide beyond the information provided in the agenda.
- II.A.1.b In the matter of the Petition for Review of Hazardous Waste Final Permit No. MTHWP-03-01 issued to Flying J Petroleums, Inc., BER 2003-14HW.
- Ms. Orr had no further information to provide beyond the information provided in the agenda.
- II.A.1.c In the matter of violations of the Montana Water Quality Act by the City of Lewistown Wastewater Treatment Plant, BER 2004-15 WQ.
- Ms. Orr had no further information to provide beyond the information provided in the agenda.
- II.A.1.d In the matter of violations of the Montana Public Water Supply Laws by Darwin Simac d/b/a Jackson Creek Saloon, Montana City, Jefferson County, BER 2005-05 PWS.
- Ms. Orr said a hearing had been held in August for this case and that she would be issuing a decision prior to the next meeting.
- II.A.1.e In the matter of violations of the Montana Water Quality Act by Bar S Livestock, Inc., Toole County, BER 2005-06 WQ.
- Ms. Orr had no further information to provide beyond the information provided in the agenda.
- II.A.1.f In the matter of violations of the Water Quality Act by ASARCO, Inc., BER 2005-09 WQ.
- Ms. Orr had no further information to provide beyond the information provided in the agenda.
- II.A.1.g In the matter of violations of the Opencut Mining Act by Kenneth Mikesell d/b/a

- Mikesell Gravel Mine, Meagher County, BER 2005-10 OC.
- Ms. Orr had no further information to provide beyond the information provided in the agenda.
- II.A.1.h In the matter of the notice of violation of the Opencut Mining Act by Mickelson Rock Products, LLC, at the Tricon Pit #2, Mineral County, BER 2005-12 OC.
- Ms. Orr had no further information to provide beyond the information provided in the agenda.
- II.A.1.i In the matter of violations of the Montana Operator Certification and Public Water Supply Laws by Richard Kelly at the Ten Mile-Pleasant Valley Lagoons, Lewis & Clark County, BER 2005-13 PWS.
- Ms. Orr had no further information to provide beyond the information provided in the agenda.
- II.A.1.j In the matter of the denial of the approval of subdivision plans of Sunnyside Orchards #1, Block 6, Lots 29, 30 and 31, Ravalli County, EQ #05-2598, BER 2005-15 SUB.
- Ms. Orr had no further information to provide beyond the information provided in the agenda.
- II.A.1.k In the matter of the air quality permit for the Roundup Power Project, Permit No. 3182-00, BER 2003-04 AQ.
- Ms. Orr had no further information to provide beyond the information provided in the agenda.
- II.B.1 In the matter of the NPRC petition for rulemaking regarding coalbed methane wastewater.
- II.B.2 In the matter of the MEIC petition for rulemaking regarding metal mine reclamation rules.
- Mr. Ellerhoff explained the times and places of the two upcoming sets of rulemaking hearings: 1) NPRC's petition for rulemaking regarding coalbed methane wastewater; and 2) MEIC's petition for rulemaking regarding metal mine reclamation rules.
- II.B.3 In the matter of the Upper Blackfoot Mining Complex.
- Mr. Bowers provided an update regarding the ASARCO bankruptcy and the potential that it could have on future work at the Upper Blackfoot Mining Complex, and an update on the revised scope of work and what ASARCO is hoping to accomplish for the 2005 work season.

Mr. Bowers said the allocation of the trust fund for 2005 has already been impacted -- \$280,000 was coming from the trust fund and \$70,000 from ASARCO. He said ASARCO has withdrawn the \$70,000 and that ASARCO does not know when that money will come available for the 2005 work season.

Mr. Bowers said ASARCO is working on amending the scope of work for 2005. He said ASARCO and ARCO are currently out of compliance with a temporary settlement agreement from a lawsuit the DEQ has filed against both parties, but that the DEQ is working with them to get them back on track. He said financial constraints, as well as other concerns, would impact the Upper Blackfoot.

Discussion took place as to the lateness in the 2005 season of the work beginning.

- III.A.1 In the matter of the application by Patty Irvine d/b/a Marks Environmental Service, for renewal of septage disposal license, BER 2005-11 SW.

Ms. Orr provided a brief summary and update of the case. She said Ms. Irvine had withdrawn her appeal, that the Department had filed a motion to dismiss with prejudice, and that the Board had not received any response from Ms. Irvine on the Department's motion. Ms. Orr supplied copies of a proposed order to dismiss the case.

Chairman Russell called for a motion to authorize the Board Chair to sign the order. Mr. Rossbach so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.A.2 In the matter of violations of the Open Cut Mining Act by Century Companies at the Bergh Pit, Plentywood, Sheridan County, BER 2005-14 OC.

Ms. Orr provided a summary of the case and a brief update. She said the DEQ and Century have entered into an Administrative Order on Consent. She provided the Board with copies of a proposed order to dismiss the case.

Chairman Russell called for a motion to authorize the Board Chair to sign the dismissal order. Mr. Marble so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.B.1 In the matter of DEQ's proposal to initiate rulemaking to update rules at ARM 17.38, Subchapters 1 and 2, pertaining to public water supply systems.

Ms. Clark said the major changes being proposed are revisions to the Department's Circular DEQ-1, which covers design standards for community water supplies. She said the current version of the circular was adopted in 1982 and that it has only had minor revision since that time. She said Montana takes its design standards from the Ten-State standards and that these standards were significantly altered in 2002. She said the majority of the proposed changes are to bring Montana standards into compliance with current Ten-State standards.

Ms. Clark said the Department is also requesting revisions to DEQ-3 design standards for non-community systems to ensure consistency with DEQ-1 where appropriate. She summarized the changes being proposed.

Ms. Clark said the proposed changes had been discussed with several interest groups and that no comments had been received.

Chairman Russell suggested that the Board assign the rulemaking to the presiding officer.

Discussion took place regarding this rule being in the authority of both the Board and the DEQ, and Mr. North explained what that meant to the Board.

Chairman Russell called for public comment regarding the proposed rulemaking. There was no response.

Chairman Russell called for a motion to initiate the rulemaking and to appoint Ms. Orr presiding officer for this matter. Ms. Shropshire so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.B.2 In the matter of DEQ's proposal to initiate rulemaking to update certain water quality standards in Circular WQB-7 and to update rules at ARM 17.30, Subchapters 5, 6, 7 and 10, pertaining to mixing zones, surface water quality standards, nondegradation requirements, and groundwater rules.

Mr. Bukantis said the Department was requesting that the Board initiate rulemaking on its water quality standards triennial review package. He said the Department is required to review, update and modify the water quality standards, as appropriate, every three years. He said this is seen by DEQ as routine periodic housekeeping and that most of the changes are non-controversial. He said it is the Department's intent to keep Montana water quality standards current with the latest EPA guidance and best available science.

Mr. Bukantis outlined the schedule the Department was proposing to keep with regard to this rulemaking. He summarized the changes being proposed, highlighting a couple of them: 1) the arsenic standard will drop to 10 mcl from 18; 2) changing from fecal coliform to e. coli as indicators of the potential for water to transmit gastrointestinal disease. He said the largest single factor that is driving some of the changes is a change in the assumption of how much fish people eat, which is based on USDA surveys.

Mr. Bukantis said the DEQ has done a lot of outreach on the proposed changes. He summarized the feedback received from the outreach. One common concern was the number regarding how much fish people consume -- many interested people want the Department to set a number for Montana, though the Department believes the USDA number is reasonably protective. He said the DEQ did not want to further delay the rulemaking.

Further discussion took place and Mr. Bukantis and Mr. Levine responded to questions from Board members Ms. Shropshire and Mr. Rossbach.

Ms. Orr confirmed her availability for a November hearing. He called for public comment. There was no response.

Chairman Russell called for a motion to initiate the rulemaking and to appoint Ms. Orr presiding officer for this matter. Ms. Shropshire so MOVED. Mr. Marble SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.B.3 In the matter of DEQ's proposal to reinitiate a portion of a previous rule initiation pertaining to rules at ARM 17.30.13 pertaining to concentrated animal feeding operations (CAFOs).

Mr. Madden explained that a Federal Court decision is part of what is driving this amended rule notice. He said the purpose of the amended notice is to move forward with the rules as they were originally proposed in December 2004, except that provisions that were stricken and vacated by the Federal Court decision of February 2005 would be dropped. He provided some history of the rules being proposed.

Further discussion took place and Mr. Madden and Ms. Smith responded to Board questions.

Chairman Russell called for public comment regarding the proposed rulemaking. No one responded. Ms. Orr confirmed her availability to be the presiding officer for this matter.

Chairman Russell called for a motion to reinitiate the rulemaking and to appoint Ms. Orr presiding officer. Mr. Rossbach so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.B.4 In the matter of DEQ's proposal to initiate rulemaking to update the State Solid Waste Management Plan.

Ms. Moore explained that the State Solid Waste Management Plan is a policy document intended to provide direction to DEQ and to local governments implementing an integrated approach to solid waste management. She said the Integrated Solid Waste Management Act of 1991 directed DEQ to develop a plan and to review it every five years. She said in 1999 the DEQ determined it was still okay as it was, but that in 2004 they identified many needed changes. She said the Department had worked with many interest groups and had held public hearings regarding the proposed changes.

Ms. Moore said there are two key components to the Plan: 1) a new goal statement; and 2) a series of recommendations of how to reach the goal statements. She said that because the goal statement is in the Act, the DEQ went to the 2005 Legislature and the Legislature did adopt the goal statement. Ms. Moore provided a summary of the Plan.

Further discussion took place and Ms. Moore and Mr. North responded to Board questions.

Ms. Orr confirmed her availability to act as presiding officer for the rulemaking.

Chairman Russell called for public comment on the proposed rulemaking. There was no response.

Chairman Russell called for a motion to initiate the rulemaking and to appoint Ms. Orr presiding officer over the matter. Ms. Shropshire so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.C In the matter of final action regarding the amendment of ARM 17.8.504, 17.8.505 and 17.8.514 for the annual adjustment of air quality application, operation and open burning fees.

Mr. Homer said the presiding officer held a hearing August 3 on the adoption of this rulemaking and that there was no member of the public present at the hearing. He said one written comment had been received and that the comment had been addressed in the response to comments and the proposed final notice. He said the Department is requesting adoption of the rules as proposed.

Chairman Russell called for a motion to adopt the rules as proposed, the presiding officer's report, the responses to comments, and the 521 and 311 analyses. Mr. Marble so MOVED. Mr. Rossbach SECONDED the motion. Chairman Russell called for public comment; there was no response. The motion CARRIED with a unanimous VOTE.

III.D In the matter of the Montana Environmental Information Center (MEIC) petition for rulemaking to amend ARM 17.8.740 and to adopt New Rule I pertaining to control of mercury emissions from facilities that combust coal to generate electricity for sale.

Director Oppen informed everyone that the Center for Energy & Economic Development (CEED) petition for rulemaking would not be addressed today. He noted a wide discrepancy between the position of MEIC and CEED regarding mercury control.

Director Oppen said the DEQ believes that Montana needs the strongest, most economically and technologically feasible mercury rule. He said the current federal EPA mercury rule does not go far enough. He said the DEQ favored the petition submitted by MEIC and others, especially the flexibility. The Department is taking a neutral stance on the petition, however, because it is not comfortable that the specific targets listed in the petition are appropriate for Montana.

Director Oppen discussed timing and workload issues. He said the DEQ did not feel comfortable that it would have sufficient time and resources to devote to this

issue in the short amount of time available. He said the Department would like more time to discuss this with the petitioners and the industry groups and to try to narrow the gap between the two sides. He asked that the Board deny the petition with an understanding that the Department would bring a proposed rule back to the Board in December or February.

Ms. Hedges emphasized that the petition was submitted by more than just environmental groups – public health, tribal organizations, labor organizations, church groups, individual doctors and members of the public were also included as petitioners. She explained the proposed rule in detail – existing facilities would have until July 1, 2011, to comply and would have four ways to choose from; new facilities would have to meet the standard upon commencement of the sale of electricity.

Ms. Hedges presented technical studies to show that the rates proposed in the rule are achievable and talked about various control technologies. She urged the Board to initiate the proposed rulemaking now.

Mr. Eggers urged the Board to initiate the proposed rulemaking.

Mr. McCracken talked about the effects of mercury on humans, emphasizing the effects on developing fetuses and infants.

Ms. Weir talked about the effects of mercury on children and the impacts of those effects on educational systems and society in general. She talked about the benefits of mercury emissions reductions. She said the Montana Public Health Association asks that the Board initiate the rulemaking process.

Mr. Hamilton urged the Board to initiate the rulemaking.

Ms. Whitebird talked about mercury from the Colstrip power plant reaching the Northern Cheyenne reservation and said the tribe is actively backing the proposed mercury rule.

Mr. King, Ms. Eggers, Dr. Reichert, Mr. Kim Wilson, Mr. Siemers, Ms. Ellis, and Mr. John Wilson spoke in support of the proposed rulemaking.

Mr. Jauders spoke of his experience with mercury poisoning.

Mr. Leow discussed the EPA mercury rule.

Ms. Gorman, Mr. Lewin and Mr. VanDyke urged the Board to initiate the rulemaking.

Mr. Schneider made himself available for questions as an informational witness.

Mr. Clinch said his group opposes the proposed rulemaking. He discussed how

mercury is naturally occurring in the environment, accounting for 50 percent of all worldwide mercury measured. He said Montana's three coal-fired electrical generating units account for less than one hundredth of 1 percent of the global mercury.

Mr. Clinch discussed the EPA mercury rule. He said the proposed 90 percent containment level in the proposed rule is unattainable. He asked that the Board delay action on the petition until they have had the opportunity to evaluate the alternative petition submitted by CEED.

Dr. Charnley spoke about the mercury cycle, power plant emissions and methyl mercury exposure.

Mr. Jones discussed mercury, mercury controls and issues associated with the same.

Mr. Lambrecht spoke in favor of the federal Clean Air Mercury Rule and in opposition of the proposed mercury rule.

Mr. Southwick spoke in opposition of the proposed rulemaking.

Mr. Seby said CEED is opposed to the proposed rulemaking and referenced CEED's own petition for rulemaking. He asked that the Board deny the MEIC petition.

Mr. Keans, Mr. Gregori, Mr. Quander, Mr. Holser, Mr. Dunbar, Mr. Kelsey, Mr. Keith Allen, Mr. Flynn, Mr. Dirkson, and Mr. Sec spoke in favor of the Board denying the MEIC petition for rulemaking.

Board members questioned testifiers. Mr. Walters and Mr. Klemp also responded to Board questions. Further discussions took place among the Board.

Mr. Rossbach MOVED for the Board to reject the petition on the basis that the Department would bring another proposal for mercury limiting rules to the Board no later than February 2006. Ms. Lacey SECONDED the motion. Further discussion took place. The motion CARRIED with a 4-1 VOTE.

Chairman Russell inquired about CEED's intentions with its petition.

Mr. Seby stated that it was not CEED's intention to withdraw its petition. CEED's petition will be addressed November 9 in Lame Deer.

IV. General Public Comment

Mr. Olson informed the Board of a petition filed this morning by himself and 20 other legislators regarding the petition filed by NPPRC and others on May 17, 2005, in

which they request the Department prepare a statement of economic impact regarding the proposed amendments. He said the Department is required to file the statement with the Board within three months from the date the request was filed. He provided information as to what was required to be included in the statement.

There were no further public comments.

V. Adjournment

Chairman Russell called for a motion to adjourn. Ms. Lacey so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.

The meeting adjourned at 4:20 p.m.

Board of Environmental Review September 30, 2005, minutes approved:

JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

DATE